No. 96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

YVETTE M. WRIGHT, HORACIO L. QUINONES, DARWIN BOLDEN, BENNY CARTAGENA, RAMON DIAZ, JOSEPH R. ERAZO, BLORNEVA SELBY, WALSH McDERMOTT, SETH DUBIN, all individually and on behalf of all other persons similary situated, *Plaintiffs-Appellants,*

—*against*—

NELSON A. ROCKEFELLER, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, JOHN P. LOMENZO, Secretary of State of the State of New York, and DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEE, Commissioners of Election constituting the Board of Elections of the City of New York, *Defendants-Appellees,*

—and—

ADAM CLAYTON POWELL, J. RAYMOND JONES, LLOYD E. DICKENS, HULAN E. JACK, MARK SOUTHALL and ANTONIO MENDEZ, *Defendants-Intervenors-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING

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Appellants respectfully request that this Petition for Rehearing be granted and:

(1) that the judgment of the Court be vacated and that the case be remanded to the three-judge court for the taking of further evidence; or, in the alternative,

(2) that a further hearing be held in this Court.

As to remand:

Relying upon *Hernandez* v. *Texas,* 345 U. S. 475 (1955) and the cases cited in the Jurisdictional Statement (pages 14 and 15), appellants throughout this litigation took the view, expressed in the two dissenting opinions in this Court, that they were not required to introduce specific evidence of legislative motive in order to prove their case. Now this Court has ruled that appellants' case must be dismissed for lack of proof that the legislature was "motivated by racial considerations" and that the challenged statute was "a state contrivance to segregate on the basis of race or place or origin." These elements are thus made indispensable to appellants' case.

Since the opinion of the Court has thus enunciated an entirely new standard of proof applicable in this type of case, the appropriate disposition should be remand to enable the appellants to meet this new standard rather than dismissal, c.f. *Yates* v. *United States,* 354 U. S. 298, 327-28 (1956). Appellants should not be barred by *res judicata* from vindicating their constitutional rights in a situation where a new standard of proof has been enunciated.

Appellants believe that on remand they could introduce evidence to meet this standard of proof by subpoenaeing various documents and persons connected with the enactment of the statute.

Appellants have taken the position throughout this litigation that specific evidence of legislative motive was neither a necessary nor desirable element of proof in a segregation case. They have contended that focusing upon legislative motive would encourage legislative subterfuge and have the effect of sustaining demonstrable segregation all over the country. When asked by the three-judge court

to stipulate as to evidence of one alternative inference of legislative motive, appellants submitted a memorandum (see the original record filed with this Court, pages 516-30) asserting that such evidence was constitutionally irrelevant but requesting the court, if it deemed such evidence relevant, to make a specific ruling to that effect and to order a further hearing at which full evidence could be adduced. The court neither so ruled nor ordered a further hearing.

Now that this Court has finally ruled, in effect, that specific evidence regarding legislative motive is relevant, appellants are entitled to a full hearing on this issue.

As to rehearing by this Court:

(1) The opinion of the Court states that racial segregation was not proved because there was "evidence" in the record to support the contrary inference. Appellants find no such "evidence" whatever and believe that the Court has an obligation to indicate the nature of that "evidence." This is especially so in view of the tacit admissions by both the State and Intervenors that race was the basis of the statute. Both in its brief and argument to this Court, the principal argument of the State was that use of racial criteria could not possibly have been avoided and that use of such criteria was constitutionally permissible (see Brief for Appellees, pages 19-20 and 35-39). No clearer concession of appellants' factual contention would be possible. And Intervenors, by alleging that "Negroes and Puerto Ricans now control" the 18th district (Printed Record Page 17) candidly indicated their view as to the basis of the statute (although they later attempted to ignore this concession).

The only hint of the "evidence" referred to by the Court is its further statement that "concentration of colored and Puerto Rican voters in one area . . . made it difficult . . . to fix districts so as to have anything like an equal division

of these voters among the districts". Appellants heartily agree. But they also believe, as stated in the Jurisdictional Statement (page 11), "that the legislature could not have drawn the district lines so as to create a *more* segregated pattern." In other words, the legislature scrupulously followed racial residential patterns so as to create maximum segregation. Appellants never contended for racial *equality* in the four districts—only for legislative *neutrality* in regard to race, which the State conceded was not the case.

Perhaps the Court was referring to questions raised in oral argument regarding a partisan political alignments in the four districts. But surely partisan political factors do not explain concentration of Negroes and Puerto Ricans in the 18th District rather than the other two "Democratic" districts. And even with respect to the presently "Republican" 17th, the only "evidence" shows that partisan politics may not adequately explain the district boundaries. Appellants' memorandum to the three-judge court (see the original record filed with this Court, page 529), shows that at the time the 1961 statute was enacted, of the registered voters in the new 17th District, only 38% were enrolled as Republicans; that the registered voters added to the 17th in 1961 were only 35% enrolled Republicans; and that of the registered voters in the only area dropped from the 17th in 1961 about 57% were enrolled Republicans.

Moreover, the fact that politics, as must inevitably be the case in any districting statute, played a role in motivating the legislature is not inconsistent with the appellants' contention of segregation. Obviously, some of the legislators voted for the statute in part because they believed it would advance their political party. Indeed, appellants believe that they could show on remand that the challenged portion of the statute was the joint product of the political party in power, which desired an all-white district, and

those who deemed "control" of the other segregated district beneficial to them. Since the party in power assumed that Negro and Puerto Rican voters were overwhelmingly allied to the other party, it stood to benefit from an all-white district and also deemed its interests coincident with those who benefit from the "jamming" of Negroes and Puerto Ricans into a single district. The fact that some of those who supported the statute may thus have been motivated by a mixture of partisan political and racial considerations should not insulate the statute from constitutional challenge. An *exclusive* legislative motive to achieve segregation could rarely, if ever, be proved anywhere in the country.

The opinion of the Court would also seem to permit racial segregation whenever an inference of some other basis is *"equally"* persuasive from the record. The result will be to grant license to state legislatures in all parts of the country to engage in the most extreme forms of racial gerrymandering. All that legislatures need do is establish in the legislative history some other basis which could be deemed *"equally"* persuasive in order to render a racial gerrymander immune from constitutional challenge. Does the Court really mean to hold that partisan politics, or some other concurrent basis, can excuse racial gerrymandering of political districts? Such holding would adopt a standard equivalent to that applied in economic regulation cases and thereby apparently reverse the line of cases in which this Court has holding that, where an effect of racial segregation has been shown, an alleged motive to achieve some other objective is irrelevant, e.g. *Eubanks* v. *Louisiana*, 356 U. S. 584, 588 (1958)?

By failing to indicate the "evidence" which it found to support a contrary inference, the Court has deprived appellants of an opportunity to put in issue the constitutional relevance of that evidence. If the "evidence" referred to

by the Court shows that the statute was based upon partisan politics, economic status or any basis other than equality of population, appellants believe a serious question arises under the Fourteenth Amendment.

(2) The Court also states that the question of underrepresentation of congressional districts is "wholly separate" from the question of racial segregation. But appellants have consistently contended that the "17th could not be expanded in any direction so as to make it reasonably equal in population to the other districts" (Jurisdictional Statement, page 6) without undermining the effect of segregation. Of course, underrepresentation was mentioned throughout by appellants only as evidentiary of the more significant evil of racial segregation. But is also clear from the record that adherence to the "as nearly as practicable" equality test of *Wesberry* v. *Sanders*, No. 22, decided February 17, 1964, would go a long way toward removal of the problem of racial segregation. "As nearly as practicable" must surely mean on Manhattan Island something very close to mathematical equality in view of the absence of political subdivisions and natural geographic barriers.

(3) Even if the dichotomy between malapportionment cases and this case were conceded, the Court should nevertheless, consistent with the questions presented in this appeal, strike down the challenged portion of the statute on grounds of malapportionment. Because malapportionment was a key evidentiary element of the appellants' case, it is fairly comprehended within the questions presented. Moreover, the opinion of Judge Moore in the three-judge court discusses at length the population disparities in the four districts as compared with the state-wide average and the city-wide average, as well as statistics regarding individual districts in various parts of the state; and printed as Appendix B to the Jurisdictional Statement is the full text

of the report of the Joint Legislative Committee on Reapportionment which discusses the numerical considerations on which the apportionment statute is based.

Failure of the Court to consider the "as nearly as practicable" equality test in relation to the facts included in the record in this case would only impose a burden upon private litigants to introduce the same proof in a separate proceeding. The record in this case contains all of the statistics necessary to a finding of malapportionment in the four districts on Manhattan Island, which the statute has treated as a separate entity for Congressional districting purposes. Such a finding would furnish constitutional guidelines applicable in urban areas elsewhere in the country.

This record shows that the population difference between the largest district in Manhattan (the 19th with 445,000) and the smallest district (the 17th with 382,000) is 15.4%. Further, as indicated in Judge Moore's opinion, the 19th is 28% larger than the 24th district (with only 348,940), the smallest in New York City. In view of the absence of political subdivisions and natural geographic barriers, "as nearly as practicable" on Manhattan Island must surely mean something very close to precise mathematical equality.

The ease of applying the "as nearly as practicable" equality test in this case is demonstrated by the application in Manhattan of the test required for state senatorial districts by the state constitution (Art. 3 § 4): "that each district shall contain as nearly as may be an equal number" of citizens. The six senatorial districts in Manhattan contain citizen populations, as set forth within the districting statute itself, varying from 299,285 to 299,290, a maximum differential of only five citizens among the six districts. N. Y. State Law § 121, Twentieth through Twenty-fifth Senate Districts (McKinney's Supp. 1963).

CONCLUSION

For the foregoing reasons the judgment of the Court should be vacated and the case remanded for the taking of further evidence; or, in the alternative, appellants respectfully request a rehearing in this Court.

Respectfully submitted,

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CERTIFICATE PURSUANT TO RULE 58

Pursuant to Rule 58 of the Rules of this Court the undersigned, counsel in this case, hereby certifies that the within Petition for Rehearing is presented in good faith and not for the purpose of delay.

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JUSTIN N. FELDMAN
Attorney for Appellants